UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NUTRITE CORP.,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-0186-B
	)	
KEITH McCRUM, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS JEAN PAUL LeBLANC AND JAY McCRUM'S MOTIONS FOR SUMMARY JUDGMENT

This action arises from Plaintiff's sale of fertilizer to two Aroostook County, Maine farmers in the spring of 1997. Plaintiff's national credit manager, Rock Fraser, made a decision at that time to deny credit to Keith McCrum and McCrum Farms, Inc. (whose principal was Robert McCrum). Upon learning that Jay McCrum, an important customer to Plaintiff, would be unhappy to hear that his cousins had been denied credit, Mr. Fraser suggested Jay McCrum could guaranty their obligations.

Plaintiff alleges that its former CEO and General Manager Jean Paul LeBlanc conspired with Jay McCrum to obtain guaranties sufficient to induce Fraser to extend credit to Keith McCrum and McCrum Farms, Inc., with the understanding and intention that the guaranties would never be used against Jay McCrum. LeBlanc's employment with Plaintiff was thereafter terminated (for a different reason), following which it is alleged Jay McCrum wrongfully secured the return of the guaranties from LeBlanc's successor. Keith McCrum and McCrum Farms, Inc. defaulted on their obligations. McCrum Farms, Inc. filed for bankruptcy in October, 1998. This

action was filed in July, 1999 against Keith McCrum, Jean Paul LeBlanc, and Jay McCrum. The Court entered default judgment against Keith McCrum on September 14, 1999.

Nutrite has asserted claims against Jay McCrum on the guaranties (Count IV), against Paul LeBlanc for breach of fiduciary duty (Count VIII), and against both McCrum and LeBlanc for fraud (Count V), negligent misrepresentation (Count VI), and for punitive damages (Count VII). Defendants have filed separate Motions for Summary Judgment on the entirety of Plaintiff's claims against them. The arguments in support of the request for judgment on the common claims (Counts V-VII) are presented by Defendant LeBlanc.

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

Statement of Facts

Many of the facts surrounding the transactions giving rise to this Complaint are not disputed. In the spring of 1997, Jean Paul LeBlanc was president of Nutrite Corp., and Rock

Fraser was in charge of credit matters. Fraser's authority with respect to credit matters was superior to LeBlanc's. LeBlanc reported to Gilles Payette. Gerald Dow was a sales representative, and Otis Stevens the area manager, for Nutrite Corp. Bruce Kennedy was also employed by Plaintiff, but his status at the time in question is unclear from this record.

In the spring of 1997, Fraser decided not to extend credit to Keith McCrum and McCrum Farms, Inc. When Bruce Kennedy told Fraser that Defendant Jay McCrum would be unhappy to learn that credit had been denied these farmers, Fraser suggested to Kennedy that McCrum could guaranty the debt. He provided forms to Kennedy for that purpose.

LeBlanc discussed the need for the guaranties with McCrum in March, 1997. At LeBlanc's request, Gerald Dow obtained McCrum's signatures on the guaranty forms. Dow does not recall if the forms were completed at the time McCrum signed them. Neither party remembers, but apparently Dow thereafter delivered them to Kennedy, who showed them to Fraser. Fraser approved the credit applications.

LeBlanc resigned from the company effective June 1, 1997. Kennedy replaced him as president. Sometime thereafter, Kennedy had a conversation with McCrum in which McCrum indicated the guaranties "were not to be used." Kennedy asked Dow if he knew anything about the guaranties, and Dow responded that he thought they were never to be used. Kennedy gave the guaranties to Dow, and Dow returned them to McCrum.

I. Fraud and Negligent Misrepresentation.

Defendants assert that Plaintiff may not prevail on its claims for fraud and negligent misrepresentation because there is insufficient evidence that Defendants made a false representation that the guaranties were "good and effective security for the extension of credit to .

. . Keith McCrum and McCrum Farms, Inc." Comp. ¶¶ 32, 37. Plaintiff's claims for fraud and negligent misrepresentation both require that it prove Defendants made a false representation or provided false information upon which Plaintiff reasonably relied to its detriment. *Glynn v. Atlantic Seaboard Corp.*, 728 A.2d 117, 119, 1999 ME 53, ___ (fraud); *Perry V. H.O. Perry & Son Co.*, 711 A.2d 1303, 1305, 1998 ME 131, ___ (negligent misrepresentation). Plaintiff responds with citations to the deposition testimony of Gerald Dow and Otis Stevens (Pltf. Stmt. Opposing LeBlanc Stmt. of Facts at ¶¶ 7, 8, 15). Plaintiff correctly asserts that these deponents offered evidence suggesting that one or both of the Defendants intended that Nutrite would not seek to invoke the guaranties. In particular, Gerald Dow testified that LeBlanc responded to Dow's hesitation about getting the guaranties from McCrum by telling him "just don't ask any questions; go get it signed; that they're never to be used." Dow Dep. at 30. He testified that LeBlanc later told him "to make sure that we looked after Jay [McCrum] because those were never to be used." *Id*. at 41. Dow further testified that McCrum made comments to him at various times about the "deal" and reminded him that the guaranties were never to be used. *Id*. at 44-45.

The Court concludes, however, that Defendant LeBlanc is entitled to judgment as a matter of law on Plaintiff's claims for fraud and negligent misrepresentation. There is no evidence in this record that LeBlanc ever made a representation to any Nutrite employee, including Fraser, to the effect that the guaranties were good and sufficient surety. Further, the evidence is uncontroverted that the guaranties were executed and in the possession of Plaintiff when Fraser agreed to extend credit to Keith McCrum and McCrum Farms, Inc. LeBlanc then left the company. If Defendant McCrum did not thereafter seek the return of the guaranties,

Plaintiff would not have been harmed at all, regardless of LeBlanc's intent or any promises he may have made to McCrum. Defendant LeBlanc is entitled to judgment as a matter of law on Plaintiff's claims in Counts V, VI of the Amended Complaint. Defendant LeBlanc is also entitled to judgment on Plaintiff's request for punitive damages in Count VII to the extent it relates to Counts V and VI.

The question is not as clear with regard to Defendant McCrum. Unlike LeBlanc, McCrum actually did make a representation to Plaintiff by signing the guaranties. Further, unlike LeBlanc, he does not benefit from the "fortuitous" circumstance that the guaranties may well have been fully enforceable when they were in Plaintiff's possession because he was able to secure the return of the guaranties. For these reasons, the Court is satisfied that Defendant McCrum is not entitled to judgment as a matter of law on Counts V and VI.

II. Enforcement of the Guaranties.

Defendant McCrum seeks judgment as a matter of law on Plaintiff's claim on the guaranties in Count IV of the Amended Complaint. Defendant asserts two separate grounds upon which he believes he is entitled to judgment.

A. Waiver.

First, Defendant argues that Plaintiff waived its claim under the guaranties when its agent voluntarily returned the guaranties to Defendant. Plaintiff correctly states that there can be no waiver, viewing the facts in the light most favorable to Plaintiff, because Dow was acting against his employer's interests, and McCrum was clearly on actual notice of that fact. *See, American Realty Co. v. Amey*, 118 A. 475, 479-80 (Me. 1922) ("'[e]very agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than

the principal, in the absence of an agreement that it may be so used; and, as this is a matter of law, and not of fact, all persons must take notice of it'") (quoting 21 R.C.L. at p. 910, § 88); *see, also,* Restatement (Second) of Agency § 165 (1958) (noting that a principal is generally liable for the acts of its agent even if the agent acts for improper purposes, "unless the other party has notice that the agent is not acting for the principal's benefit").

B. Vague and Ambiguous.

Defendant next asserts that the guaranties are unenforceable under the statute of frauds because Plaintiff is unable to produce the actual writings setting forth the terms of the guaranties, and the forms Plaintiff seeks to use to prove the terms of the guaranties are insufficient as a matter of law. There is no dispute that the Maine statute of frauds applies to the transactions at issue in this matter. That statute provides:

> No action shall be maintained . . . [t]o charge any person upon any special promise to answer for the debt, default or misdoings of another . . . unless the promise, contract or agreement on which such action is brought . . . is in writing and signed by the party to be charged therewith . . . .

33 M.R.S.A. § 51(2).

Defendant refers the Court to a recent case interpreting the statute as it relates to contracts for the sale of real property. In that case, the issue was whether the description of the property was sufficient under the statute. *Gagne v. Stevens*, 696 A.2d 411 (Me. 1997). The Maine Law Court, citing a case from 1898, noted that all of the essential terms of the contract must be contained within the writing, and expressed with reasonable certainty, without resort to parole evidence. *Id*. at 414 (citing *Kingsley v. Siebrecht*, 42 A. 249 (1898)). Both *Gagne* and *Stevens*

referred to contracts involving an "interest in or concerning" land. 33 M.R.S.A. § 51(4). Another case cited in *Gagne* in support of the same proposition held that a will did not constitute a sufficient writing under the statute in a case where agreement was to devise property in consideration of marriage. *Busque v. Marcou*, 86 A.2d 873, 875 (1952) (addressing 33 M.R.S.A. § 51(3)).

Little has been written about the interpretation of the Maine Statute of Frauds as it relates to contracts of guaranty. As the Law Court did in *Gagne*, this Court must resort to a precedent now a century old. Despite its age, however, the statement of law is clear:

> "Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default, or miscarriage of another to be in writing, subscribed by the party to be charged thereby, and no parol evidence will be allowed as a substitute for these requirements of the statute. But, in other respects, the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts." *Bank v. Coster's Ex'rs*, 3 N.Y. 203.

Haskell v. Tukesbury, 43 A. 500, 501-02 (Me. 1899). In this case, there is testimony that there *was* a writing subscribed by Defendant McCrum. That testimony is sufficient to meet the requirements of the statute of frauds. "It is settled that the original of a written instrument need not be produced if a judge is satisfied that it is lost other than through the serious fault of its proponent." *Capitol Bank & Trust Co. v. Richman*, 475 N.E.2d 1236, 1240 (Mass. App. 1985).

In addition, there is testimony that the guaranties signed by McCrum were on the same form that Bruce Kennedy identified at his deposition as Exhibit 1. As long as the writing itself satisfies the statute of frauds, the contents of a missing writing may be proved by secondary evidence. *Id*. Further, it is not fatal to Plaintiff's attempt to enforce the guaranties that the amount owed was not expressed within the four corners of the document, nor that it was not yet established at the time Defendant executed the guaranty. The amount was also omitted from the document at issue in *Haskell*, and the Law Court had no difficulty with that omission. On this point, the Law Court quoted at length from a treatise which noted "'it is very common to identify the debt of a third person for which the defendant has made himself responsible as the debt then owing, or to become owing, by said third person to the plaintiff, without further description.'" *Id*. at 502 (quoting Brown, St. Frauds, § 385).

Defendant asserts that Plaintiff cannot produce any documentary evidence of the amount owed by Keith McCrum and McCrum Farms on product forwarded to them in reliance on the guaranties. Plaintiff offers the testimony of Rock Fraser authenticating an invoice and request for payment for goods and materials which were received by Keith McCrum and McCrum Farms from Nutrite from May, 1997 through October, 1997 in reliance on the guaranties. Fraser Dep. at 61-62, 65-66, 80-81, 102, & Ex. GP22-GP25. Whether this evidence is sufficient to persuade a jury as to the amount covered by the guaranties for Keith McCrum and McCrum Farms' accounts is not at issue on this Motion. It is sufficient to permit the jury to consider the question. Summary Judgment is not appropriate on Count IV of the Amended Complaint, seeking judgment against Defendant McCrum under the terms of the guaranties.

III. Breach of Fiduciary Duty.

Defendant LeBlanc asserts first that Plaintiff has waived any claim it might have against him by virtue of the reciprocal nature of a release of liability Defendant gave to Plaintiff in consideration of the severance package Plaintiff provided him when his employment was terminated. Defendant cites cases from several jurisdictions for the proposition that "where two parties enter into a settlement agreement without any express reservation of rights by either party, that agreement constitutes a complete accord and satisfaction of all claims of the immediate parties to the settlement arising out of the same occurrence." LeBlanc Memo. at 19. This may well be the law in Maine. As Plaintiff notes, however, the Severance Agreement and General Release, attached to Defendant's Statement of Material Facts as Exhibit 2, contains a provision designating Florida law as the law under which the agreement is to be construed. Sev. Agmt. and Gen. Rel. at ¶ 10. Defendant does not offer any reason why that choice of law provision should not be enforced. Further, Federal Rule 56 requires a movant to demonstrate that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Defendant has not presented an argument that Florida has, or would, recognize the implied reciprocity recognized in Maine. Plaintiff represents that there is no similar reciprocity provision under Florida law, and this Court has also searched for a similar provision to no avail. Accordingly, summary judgment is inappropriate on this ground.

Defendant next argues that Plaintiff cannot maintain its claim for breach of fiduciary duty against LeBlanc because "there is not a scintilla of evidence that Paul LeBlanc believed Jay McCrum would not honor whatever guarantees he signed in late May, 1997." Def. Memo. at 16. For the reasons stated in connection with the Court's discussion of Plaintiff's claims for fraud

and misrepresentation, the Court disagrees. There is sufficient evidence on this record from which a jury could conclude that Defendant McCrum signed the guaranties in reliance on Defendant LeBlanc's promise not to enforce them. Summary judgment should not be granted on Count VIII of Plaintiff's Amended Complaint.

IV. Punitive Damages.

Defendants' argument in support of their request for judgment on Plaintiff's claim for punitive damages rests on their assertion that there is no evidence of ill will in the record. I am not satisfied that the issue has been sufficiently developed on this Motion, as it relates specifically to the question of punitive damages, for the Court to issue a ruling in this regard. Accordingly, I recommend the Motion be denied as it relates to Plaintiff's claim for punitive damages against Defendant McCrum in Count VII and to the extent the allegations of Count VII are incorporated into Count VIII against Defendant LeBlanc, without prejudice to Defendants' right to raise the issue at the appropriate time during trial.

Conclusion

For the foregoing reasons, I hereby recommend Defendants' Motions for Summary Judgment be GRANTED as to Plaintiff's claims against Paul LeBlanc in Counts V, VI and VII of the Amended Complaint, and DENIED in all other respects.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being

served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
United States Magistrate Judge

Dated on: March 24, 2000

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-186

NUTRITE CORPORATION v. MCCRUM, et al — Filed: 07/16/99
Assigned to: JUDGE D. BROCK HORNBY — Jury demand: Both
Demand: $0,000 — Nature of Suit: 190
Lead Docket: None — Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1330 Breach of Contract

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